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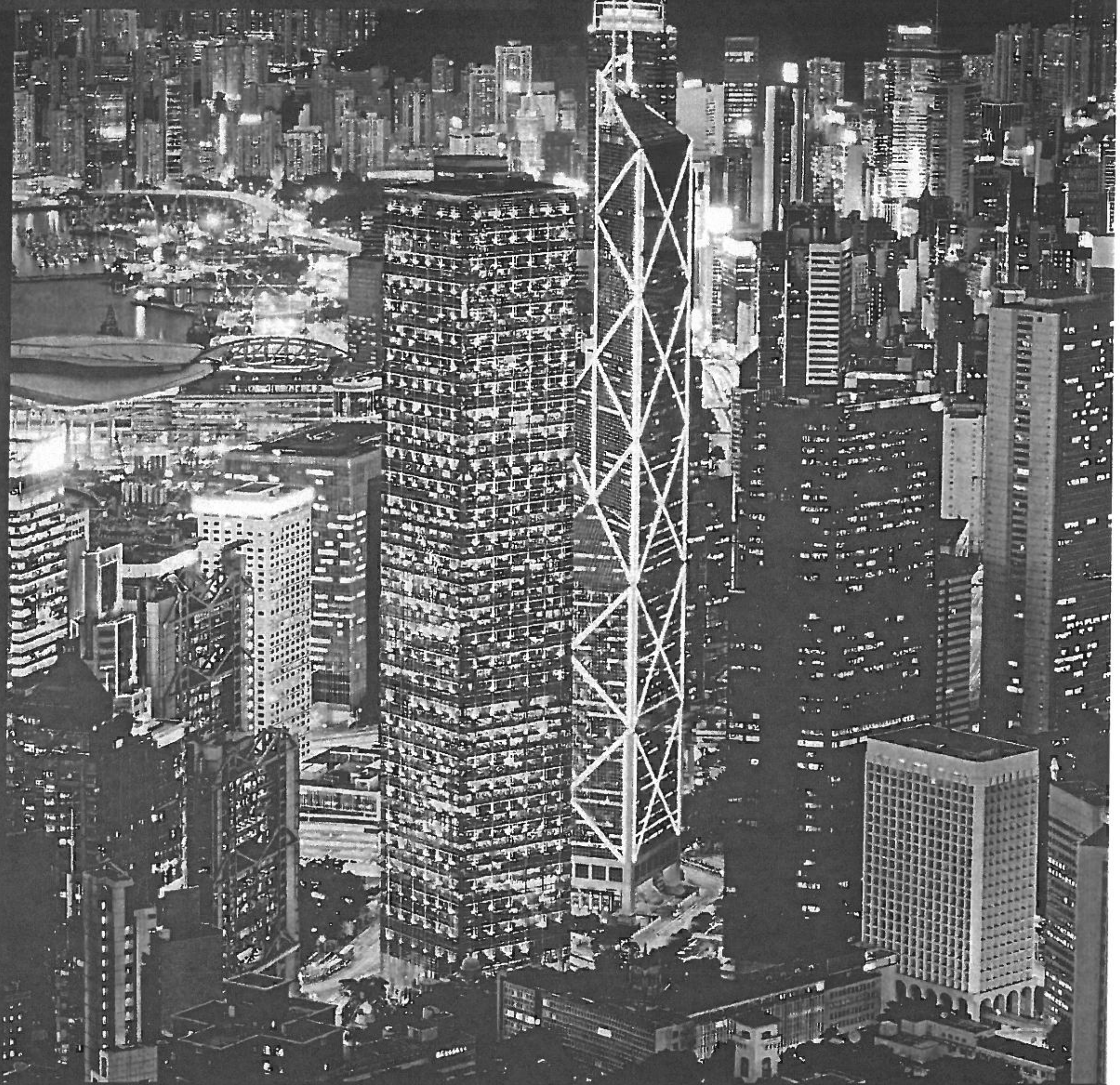

Routledge Handbook of Corporate Law

Edited by Roman Tomasic

Routledge Handbook of Corporate Law

The *Routledge Handbook of Corporate Law* provides an accessible overview of current research in the field, from an international and comparative perspective.

In recent years there has been an explosion of corporate law research, as this area of law continues to develop rapidly throughout the world. Traditionally, Anglo–American corporate law theory has dominated debates and publications; however, this handbook readdresses the balance by exploring the treatment of corporate law in both Europe and Asia, as well as developments in the US and UK. Bringing together a wide range of key thinkers in the field, this volume is divided into three main parts:

- Thinking about corporate law
- Corporate law principles and governance
- Some cross-cultural comparisons

Providing up-to-date and authoritative articles covering all the key aspects of corporate law, this reference work is essential reading for advanced students, scholars and practitioners in the field.

Roman Tomasic is Professor of Law at the University of South Australia and, until 2012, held a continuing appointment as the Chair in Company Law in Durham Law School at Durham University. He has been the Chair of the Australasian Law Teachers' Association and has also been active in legal research and the development of legal education in Australia, the United Kingdom and East Asia.

Routledge Handbook of Corporate Law

Edited by
Roman Tomasic

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Introduction

Corporate law in transition

Roman Tomasic

Corporate law has developed considerably as a field of law and practice since the corporate law statutes of the early nineteenth century. There has also been an explosion in the range of corporate law scholarship; this development has often drawn upon other traditions, such as history, economics, politics and sociology.

This volume seeks to provide an understanding of a range of contemporary intellectual concerns that has preoccupied corporate law scholars. Not only has it sought to encourage the use of comparative law methods in the analysis of corporate law issues, but it has also sought to move away from a narrow Anglo–American focus and discuss global developments in this field. This is important as the nature and meaning of corporate law will be affected by local political and social factors. As a result, it is a field that is likely to develop further by drawing upon other areas of law and cultural traditions.

In its present form, corporate law has become a relatively extensive area of law covering core company law principles and extending to corporate finance, takeovers, corporate securities law and corporate insolvency law; it also extends further to cover areas of soft law such as principles of corporate governance and even corporate social responsibility. As corporate law ideas have expanded globally, similar company law principles and statutes can be found in many countries, especially in those that are more involved in international trade and commerce. This has been paralleled by a movement towards the globalisation of large corporations and the emergence of transnational corporate groups, presenting a challenge for state-based corporate law systems and their regulation (see Blumberg 1996; Hadden 2012; de Jonge 2011). The emergence of a globalised market has inevitably created a challenge for national systems of corporate law and corporate regulation as they move to respond to this multinational challenge (see generally Milman 2009).

Although there has been a considerable degree of convergence in core corporate law ideas, principles and regulatory practices in well developed capitalist markets (Kraakman and others 2009), even here there remain substantial differences in approach between corporate law principles and practice in Western countries such as the USA, the UK and Western Europe. Whilst the corporate form has been widely adopted, the operation of its internal mechanisms has varied considerably between developed and developing countries, between countries where companies have widely dispersed shareholdings and those in which shareholdings are more concentrated; between countries in which the market for corpora control operates through active stock markets and those where these markets play a le important role in corporate control battles.

These differences are most evident when a contrast is made between hegemonic market based societies, such as the USA, and more state controlled or concentrated markets, suc as China and other parts of East Asia. Not surprisingly, the structure and form of corporat law mechanisms, such as the institutions of corporate governance, have been shown to hav been politically determined, reflecting different political traditions and accommodations ir their respective countries (Roe 1994, 2003). Despite some important superficial similaritie between different national bodies of corporate law, there remain important points of difference between them. For example, although much progress has been achieved in seeking to harmonise EU company law principles, the goal of a single private company law for the Member States of the EU remains elusive (see generally Andenas and Wooldridge 2009). This fragmentation of corporate law is also evident within individual large nation states, such as the USA and China.

Although corporate law has tended to be based on the nation state, much is to be learnt from the use of comparative law methods in the study of patterns of corporate law that are to be found in different parts of the world (see generally Siems 2014 and Chapter 1 in this volume). To some extent, basic comparative law methods have been widely used in the borrowing or transplantation of company laws from other jurisdictions. Further harmonisation efforts in regard to corporate law in part depend upon the use of more nuanced comparative law methods (see generally Siems and Cabrelli 2013; Cahn and Donald 2010; and Fleckner and Hopt 2013). However, the track record in building reliable models for the purposes of comparison has been mixed, as can be seen from the heated debate surrounding the legal origins approach to comparative corporate law that was pioneered by Raphael La Porta and his colleagues (La Porta and others 1998). This is a theme discussed further in Chapter 4 of this volume.

It could thus be said that corporate law has now assumed a level of maturity, but it is far from being uniform or close to having reached 'the end of history' in its development, as some have suggested (Hansmann and Kraakman 2001). This is not to say that corporate law has reached the end of the road in terms of developing a general model of such law, if indeed this is possible. There remain many pressures for further adaptation and change, but corporate law has often been slow to change, for example in its insistence upon the doctrine of the separate legal identity of the body corporate and a reluctance to lift the veil of incorporation. This has now become a major issue in the context of the regulation and control of corporate groups.

Pressures from other areas of law, such as from human rights law, labour law, consumer law, criminal law and environmental law are challenging some well entrenched corporate law ideas. Not surprisingly, some have even argued that in its current form, corporate law has failed (Greenberg 2006). Recent financial crises have questioned the effectiveness of corporate law gatekeepers and corporate regulation (see e.g. Coffee 2006, 2009) and seen calls for a review of many well established ideas regarding the capacity of companies and markets to be self-regulating.

Whilst it is tempting to argue that corporate law has now evolved into a more mature form, along lines found in the most modernised societies, even here there remains some diversity in view of the varieties of capitalism that can be identified in different countries; these differences have helped to shape national bodies of corporate law and have made the harmonisation of corporate law more difficult. The failure of many once highly regarded

Western companies, such as Enron, led to a reassessment of pre-existing views (see generally Armour and McCahery 2006; Gilson and Kraakman 2006). This also occurred following the catastrophic damage caused by the Global Financial Crisis (GFC), which damaged the reputations of major corporate entities and undermined the idea of self-correcting markets, in the process challenging the perceived superiority of Western corporate law and market models; this has seen a reassessment of the presumed superiority of Western corporate governance models (see generally Ferran and others 2012).

Historically, crises such as the collapse of Enron and the GFC have always provided an opportunity to review and reform corporate law practices. The world is currently within such a period of review and reform as a result of the loss of trust in banks and corporate management in many developed countries due to this ongoing crisis (see Tomasic and Akinbami 2011). This challenge has been attributed to failed corporate cultures, short-termism and opportunistic behaviour by corporate controllers. The central role of corporate culture in understanding corporate behaviour and its impact on corporate law has long been understood, but corporate law has often been ill-equipped to deal with it, unlike other areas of law, such as criminal law (see example Stone 1975; O'Brien and Gilligan 2013).

The impact of short-termism upon the governance of listed companies has also been much criticised by commentators and regulators, but it remains very difficult to deal with this problem through corporate law mechanism (see generally Kay 2013; and Keay 2011). Also, scandal and opportunism are important features of capitalist markets, but what has been described as 'looting' and the abuse of the corporate form remain key patterns of corporate behaviour in market-based societies (see generally Partnoy 2003; Mitchell 2001; Will and others 2013; Akerlof and Romer 2005). In financial markets this has been encouraged by what Maynard Keynes described as 'animal spirits' and by what Alan Greenspan saw as the 'irrational exuberance' of market actors that drove markets during the market bubble prior to the GFC (see generally Akerlof and Shiller 2009: 11–56; Shiller 2005).

These behavioural features of markets (see generally Langevoort 2006) have seen the acceleration of arguments advocating a greater role for stakeholder models of the corporation and the abandonment of narrow shareholder primacy models, which have focused upon shareholder wealth maximisation (see generally Stout 2012; Martin 2011). The development of a large academic literature dealing with stakeholder theory has been important, reflecting the influence of business school corporate governance scholars such as Edward Freeman (2010), but with a lesser impact upon legal education.

In contrast to the narrow view of the corporation as merely a 'nexus of contracts' (Easterbrook and Fischel 1991; for a critical view see Bratton 1992), stakeholder models of corporate law have relied upon the existence of higher levels of trust between stakeholders within corporate entities (Blair and Stout 1999, 2001; Tomasic and Akinbami 2013). Arguments have been made that not only must other stakeholders, such as institutional shareholders and large shareholders, take a more active role in monitoring governance within the corporation, as occurred in the Walker Review in the UK (Walker 2009), it has also been suggested that there is room for the imposition of greater responsibility upon such stakeholders, especially where they hold dominant positions of control within the corporation.

Although some legislative endorsement of a more stakeholder-oriented approach to corporate governance has occurred, such as in the United Kingdom's enlightened shareholder value approach to corporate governance (see generally Keay 2013), director primacy has created its own problems or distortions that stakeholders, such as institutional investors and employees, have been ill-equipped to manage. Similarly, there has been little enthusiasm among corporate lawyers for imposing greater duties or responsibilities upon controlling shareholders, although in cases of major environmental damage courts have sometimes sought to attach liability upon controlling or dominant shareholders, as occurred following the breach of a tailings dam operated by Samarco in Brazil: Samarco's two major shareholders were the multinational companies BHP-Billiton and Vale – Brazilian courts sought to impose liability upon its two controlling shareholders, for the damage caused by Samarco to the environment (Macdonald and others 2015).

Whilst directors of companies have often sought greater protection from prosecution in the context of business failure, there has been a counter-movement calling for greater director or agency accountability, such as renewed scrutiny of executive compensation in public companies. This has once again focused attention upon corporate cultures as a key factor explaining failures in corporate governance, even where the letter of the law has been complied with by agents of the corporation. The problem of 'toxic' culture dominated by 'perverse incentives' was frequently highlighted in the reviews of corporate failures after the GFC. This has seen a renewed focus upon the connection between corporate performance and executive compensation in companies (see generally Bebchuk and Fried 2006; Chapter 8 in this volume).

Governments and regulators were often complicit as they frequently encouraged, protected and sometimes lionised corporate leaders who were prepared to assume enormous risks, such as the former chief executive of the Royal Bank of Scotland in the UK. Of course, prevailing neo-liberal values have assumed that markets would be self-regulating and that governments should take a minimal role in companies, and that managers could be trusted to protect the interests of the corporation as a whole and not to prioritise self-serving behaviour. It is not surprising that after the GFC government regulators have become more active in seeking to emphasise the public dimensions of corporate law and the obligation of banks and financial institutions to a wider range of stakeholders, such as consumers of banking and financial services.

The relative rigidity of corporate law as a discipline has often meant that new corporate governance ideas have emerged slowly or have been the product of a crisis. Often they have been externally derived, which has seen the influence of ethical principles in shaping governance and investment practices, such as in the rise of ethical investing and the activity of civil society groups, such as NGOs concerned with corporate corrupt practices including the payment of bribes by corporations and labour practices of large domestic and globally active corporations. It is clear that a broader stakeholder approach to corporate governance will progressively reshape corporate law and public corporations particularly; however, the pace of change in this area has usually been slow. This is an inevitable consequence of the public law dimensions of corporate law and the role of corporations as private governments, which has seen a revival in recent times.

The research handbook contributions

This volume can only provide a limited overview of some of the major debates and research issues currently found in the literature on corporate law. Inevitably, the boundaries and nature of the field will be affected by the global rise of the network society and by the proliferation of information technology (see generally Castells 2010) and diverse forms of business (see generally Ribstein 2010). Inevitably, books of this kind are a reflection of the times during which they were written and will provide an introduction to some of the key developments in the three broad areas covered by contributors.

The four chapters in Part I seek to review some of the major contemporary debates and issues that have affected thinking in regard to corporate law. Professor Mathias Siems takes us through the various methods of undertaking comparative corporate law research and urges corporate lawyers to overcome the disconnection between comparative and corporate law research, as well as between legal and interdisciplinary approaches to comparative corporate law. In Chapter 2, Dr Marc Moore looks at Anglo–American corporate law and argues that the private law approach to looking at corporate law has drawn our attention away from the inherently public nature of corporate law; this distortion has been influenced by the somewhat artificial separation of corporate and securities law in the United States as a result of the distribution of corporate law-making between state and federal legislatures in the US. The increasing federalisation of US corporate law has drawn this separation into question.

In Chapter 3, Professor Stephen Bottomley brings us back to the key issue of defining the nature of corporate law, noting that the expansion of corporate law has produced a hybrid discipline. Finally in this part, in Chapter 4, Dr Rob McQueen reviews the legal origins debate that has been provoked by Rafael La Porta and his colleagues; as the model developed by La Porta and others drew heavily upon corporate law issues, it could have been characterised as a debate over how corporate law matters. McQueen points out that the conclusions reached by the legal origins research can be seen as leading to conclusions that are unwarranted and that different legal origins do not explain the differences in the economic performance of post-colonial societies.

Part II contains seven chapters that are broadly categorised as being concerned with corporate law principles and corporate governance. In Chapter 5, Professor Sally Wheeler examines issues relating to independence and diversity in the composition of corporate boards. The assumption that the mere appointment of independent directors will enhance board performance has long been challenged. After each crisis there has been a reworking of definitions of independence. Professor Wheeler notes that in recent times this has seen efforts to promote increasing diversity in the composition of company boards. In Chapter 6, Dr Folarin Akinbami draws upon his work with the Law Commission of England and Wales to examine the fiduciary duties of institutional investors in companies. This was promoted by concerns about short-termism and the decline in trust in financial investment intermediaries. He goes on to discuss the recommendations found in the Law Commission's report.

The problem of phoenix companies has been a growing concern that corporate regulators have had difficulties in grappling with. In Chapter 7, Professor Helen Anderson examines legal issues that have emerged from the separation of ownership and control, which has led to abusive use of the phoenix company. In making international comparisons, she urges caution in developing ill-targeted mechanisms for the control of phoenix companies as these may cause more harm than good. An equally contentious issue in corporate law has concerned the issue of executive remuneration and its governance. In Chapter 8, Dr Philipp Kanzow compares approaches to executive remuneration taken in Germany and the United Kingdom. The key issues in this area revolve around the setting of remuneration by the board, the disclosure of executive remuneration and shareholder voting on executive remuneration. Kanzow critically examines the strengths and weaknesses of the systems of executive remuneration found in these two countries.

In Chapter 9, Dr Jenny Fu turns to examine the emergence of corporate law in the context of state capitalism, which leads on to a case study of the governance of state-owned enterprises in China. Taking issue with the convergence of corporate law models that was proposed by Hansmann and Kraakman, Dr Fu provides further insights into the state-led model of corporate law and notes that, in the period since the passage of the new Compan Law in 2005, China has adopted a more market-based regime, but one in which the party state remains dominant. China is also discussed in Chapter 10; Dr Bo Gong compare institutional shareholder activism in the United Kingdom and China. She is critical of th nature and extent of institutional shareholder activism in both countries and argues tha greater shareholder activism may help to lower the incidence of fraud and governance failure in both countries.

Finally, Part III of the volume contains five chapters that allow us to make some cross-cultural comparisons of corporate law. These five chapters deal with China, India, Malaysia, Hong Kong and Latin America. Chapter 11 provides a critical overview of corporate governance in China by reference to recent legislative reforms. Professor Jiangyu Wang seeks to examine China's corporate governance institutions from their political, economic and social contexts, illustrating that some transplanted corporate law ideas have operated differently in China from what had originally been intended by reformers.

India is also a country that has been engaged in massive corporate reform efforts in recent years. In Chapter 12, Professor Harpreet Kaur examines India's new Companies Act of 2013 (as amended in 2015), which seeks to improve corporate governance by placing more powers into the hands of shareholders, thereby creating enhanced shareholder democracy. These reforms have sought to be synchronised with the regulations of the Securities and Exchange Board of India. The failure of Satyam in 2009, often portrayed as India's Enron, was a crisis that has helped to promote further corporate law reforms in India.

Chapter 13 examines efforts to harmonise Malaysia's British-inspired company law tradition with Islamic *Shariah* law. Professor Aiman Mohd-Sulaiman and Dr Shanthy Rachagan provide a case study of the interaction that is occurring between these two traditions and identifies some of the challenges that this will create for regulators, practitioners and investors in Malaysia. In an era of increasing legal pluralism, Malaysia provides an important case study of efforts to harmonise Western-derived corporate law with increasingly important religious and legal traditions arising from Islam.

The use of the corporate form to support family enterprises and wealth management has seen the widespread growth of the family company, which is an area where traditional corporate law ideas regarding the relationship between a company's directors and shareholders has been challenged. In contrast to the discussion of Malaysian company law, in Chapter 14 Dr Angus Young and Professor Alex Lau once again examine how a Western derived common law system has adjusted in the face of local cultural forces. By examining Chinese family companies in Hong Kong, Young and Lau note that Confucian ideals of governance have had a significant impact on the ways in which company law rules have been used by these family companies, often leading to judicial criticism.

Finally, Chapter 15 returns to what has been one of the most heated debates in academic writing on corporate law, namely the circumstances in which the veil of incorporation will be lifted to attach liability to controllers. Dr Jose Navarro examines the manner in which doctrines regarding piercing the corporate veil have been developed in Latin America, with a focus upon the civil law jurisdictions of Argentina, Brazil and Columbia.

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9

State capitalism and corporate law

The governance of state-owned enterprises in China

Jenny Fu

1 Introduction

China has announced a new round of reform initiatives to improve corporate governance of state-owned enterprises (SOEs). At the Third Plenum of the Eighteenth Congress of the Communist Party, President Xi Jinping called for the adoption of a capital management-based approach to the management of China's massive state investments in enterprises.[1] This (and a variety of other strategies unveiled by the Party) has been widely reported in the media as a major shake-up of the state sector, as well as China's greater embrace of the Temasek model for managing government investments in Singapore.

The last round of Chinese SOE governance reforms began in the early 2000s and saw the establishment of the State-owned Assets Supervision and Administration Commission (SASAC) under State Council to take control of over 100 large central government-affiliated SOEs. A high watermark of that round of reforms was the 2005 corporate law revision,[2] which was followed by various steps taken by SASAC to improve the governance of central SOEs under its control.

This chapter examines this recent history in the Chinese legal and regulatory reforms of SOE governance from the perspective of China's state-led approach to economic development. In doing so, the term 'corporate law' is used in its broadest sense to include not only corporations legislation, but also relevant administrative regulations and guidelines, as well as Party/government policy documents, as these form an integral part of the regulatory framework for SOE governance in China.

1 《中共中央关于全面深化改革若干重大问题的决定》 [Decision on Several Major Issues Concerning Comprehensively Deepening Reforms], adopted at the Third Plenum of the 18th Central Committee of the Chinese Communist Party, 12 November 2013 (Decision on Deepening Reforms).

2 《中华人民共和国公司法》 [Company Law of the People's Republic of China] (People's Republic of China) National People's Congress Standing Committee, 27 October 2005 (2005 PRC Company Law); 《中华人民共和国证券法》 [Securities Law of the People's Republic of China] (People's Republic of China) National People's Congress Standing Committee, 27 October 2005.

This chapter was inspired by a perceived disjuncture between two strands of literature on China. On the one hand, consistent with the predominance of the Anglo–American outsider-based model of corporate governance at least until the Global Financial Crisis (GFC), research on Chinese corporate governance has mainly focused on how the mechanisms of that model can be emulated to improve Chinese corporate governance, primarily the governance of listed SOEs. On the other hand, in contrast with this ongoing primacy of the Anglo–American corporate governance model, there have been some signs of change in the literature on the model of economic development employed in China.

Until the early 2000s, the Chinese approach to economic growth and development had been widely considered an incremental approach, in contrast to the various 'big bang' strategies adopted by the former Soviet Union and Eastern European countries in their transformation from a planned state to market economy (Pei 2006: 25–27). However, in more recent years, China has been increasingly viewed as 'state-led capitalism' or its short form 'state capitalism' (Bacon 2012; Bremmer 2010; Ikenberry 2011: 57). Despite their nuanced differences, the various terms (from 'state capitalism', 'state-directed capitalism'[3] to 'centrally-managed capitalism'[4]) used by different researchers point to a system in which the state plays a significant and visible role in promoting economic development through intervention in or association with businesses, particularly large businesses.

How might this perceived role shift of the state in economic development influence China's post-2005 regulation of corporate governance in SOEs (including listed SOEs) as the chief embodiment of the Chinese form of state capitalism? Indeed, the nexus between state capitalism, corporate law and corporate governance is not entirely new. In their 2001 seminal work *The End of History for Corporate Law*, Hansmann and Kraakman identified a state-oriented model of corporate governance in post-Second World War state-led economies such as France and some East Asian countries, including Japan and South Korea (Hansmann and Kraakman 2001: 446–7).

Scholarship on comparative capitalism has lent support to this observation. For example, based on a number of comparative capitalism studies that had identified state capitalism as a distinct capitalist prototype (in addition to the liberal market economies represented by the US and the UK and the coordinated market economies exemplified by Germany and post-1980s Japan), Kang (2010: 533) postulated that state capitalism is associated with a particular model of corporate governance, namely, the state-led model. Rather than maximising financial return to shareholders, the state-oriented or state-led model of corporate governance is fundamentally an instrument of the state to maintain control over corporate affairs. As Hansmann and Kraakman (2001: 446–7) put it:

> The principal instruments of state control over corporate affairs in corporatist economies generally lie outside of corporate law . . . Nevertheless, corporate law also plays a role by, for example, weakening shareholder control over corporate managers (*to reduce pressures on managers that might operate counter to the preferences of the state*) and employing state-administered criminal sanctions rather than shareholder-controlled civil lawsuits as the principal sanction for managerial malfeasance (*to give the state strong authority over managers that could be exercised at the government's discretion*).

3 Stefan Halper, *The Beijing Consensus* (Basic Books, 2010) 113; Yasheng Huang, *Capitalism with the Chinese Characteristics* (Cambridge University Press) xvii.

4 Nan Lin, 'Capitalism in China: A Centrally Managed Capitalism (CMC) and Its Future' (2010) 7 *Management and Organisation Review* 63.

This statement suggests that close state association with corporate managers lies at the heart of state-led corporate governance. However, one would doubt that this singular focused relationship-based approach (hereafter referred to as the 'post-war state-led model') would have much application to the regulation of corporate governance in SOEs in China today. Indeed, the Chinese state-led economic development takes place in dramatically different international and domestic environments from the early post-war state-led economies. With increased globalisation, competition and the pluralisation of interests within Chinese society, there are multiple strong forces that propel the policy-makers to move away from this model.

Through examining the changes and continuities in China's post-2005 reforms of corporate governance, particularly state-manager relations in SOEs, this chapter will suggest that China's post-2005 regulatory framework for SOE governance has significantly moved away from the old post-war state-led model. As the Party/state intensified efforts on strengthening the monitoring of corporate managers in listed SOEs and their state-owned parent entities by borrowing from Western, particularly Anglo-American, corporate governance, this framework has taken on a more market-oriented aspect. However, with ongoing state involvement in the appointment of top executives and management decision-making in the parent SOEs, and the high level of commingling senior executives in the listed companies and their state-owned parents, these market-based changes have not led to a fundamental systemic transformation.

Nor is this new 'reform, but without losing Party/state control' approach likely to solve the dual governance problem that has long been associated with the listed SOEs and their state-owned parents, namely excessive administrative interference and insider control by top executives at the same time. This is especially so with the persistent lack of authority and independence of SOE boards in performing their oversight functions over senior corporate executives, including the chair of the board of directors. However, owing in part to its general congruence with the Chinese model of state-led economic development, future change to this regulatory approach is likely to be incremental.

This chapter is set out as follows. Section 2 examines China's pre-2005 regulation of state-manager relations in listed SOEs and the dual governance problem associated with these companies. Sections 3 and 4 provide an overview of the various market-based mechanisms of corporate governance that have been brought into the listed SOEs and their parent companies through the 2005 corporate law revision, SASAC, as well as the current round of SOE governance reform. Section 5 considers the two main continuities in the regulation of state-managers' relations in SOEs as indicated above and their impact on corporate governance. Section 6 concludes with the broader implications of China's current approach to the regulation of state-manager relations in SOEs, given the rapid expansion of these companies overseas.

2 The pre-2005 regulatory framework and the dual SOE governance problem

China began mass corporatisation and partial privatisation of SOEs in the early 1990s. The governance of listed SOEs in China has been described as 'a control-based model, in which the controlling shareholders – in most cases, the state – employ all feasible governance mechanisms to tightly control the listed firms' (Liu 2006: 418). Whilst consistent with a state-led approach to economic development and corporate governance, this statement may have exaggerated the degree of effective state control over senior SOE executives, at least prior to the 2005 corporate law reform.

The governance structure for joint stock companies, including listed SOEs, prescribed in the 1993 Company Law (the first PRC company law) was fairly hierarchical. The structure consisted of a general meeting and two parallel boards elected by it,[5] namely the board of directors as the 'executive organ' of the company and a board of supervisors as the 'watchdog' (Zhang 2012: 40). As the state was envisaged to remain the controlling shareholder in most corporatised SOEs at the early stage of the corporatisation reform, the 1993 Company Law conferred on the general meeting a long list of powers that are usually considered as management powers in Anglo-American jurisdictions, such as the power to make decisions on the company's operational guidelines, and to approve annual budget plans and profit distribution plans (Article 103).

Where the state is the controlling shareholder, another avenue for the state to influence corporate affairs was the board of directors, primarily the chair of the board (commonly referred to as the 'chairman' in China). Unlike a typical non-executive chairman role in some other jurisdictions such as Australia, the chairman in a Chinese company enjoyed a broad range of management powers under the 1993 *Company Law*. This often allowed the chairman to overshadow the general manager (another senior management role responsible for the day-to-day management of a company) to become the company's de facto chief executive officer. For example, the chairman was responsible for convening and presiding over shareholders' and board meetings and examining the implementation of board resolutions (Article 114), as well as carrying out the functions of the board outside board meetings (Article 120(1)).

As the company's designated 'statutory legal representative', the chairman also had the sole authority to represent the company in executing contracts and undertaking legal proceedings (Article 113(2)). In addition, the chairman's position was (and is) often associated with significant political influence. As will be discussed in section 5, the chairman role is fundamentally a political appointment. The dual identity of the chairman as both a senior SOE executive and a ministerial or vice-ministerial-ranking government official allows the chairman to rotate between senior government and enterprise positions.

State involvement in corporate affairs was, however, a double-edged sword. Whilst it facilitated state-manager association to promote economic-oriented goals of the state, it paradoxically endorsed a dual corporate governance problem, namely the simultaneous lack of independence of SOE boards and the weakening of state control by corporate executives from within. This is particularly so with the high level of commingling of senior executives in listed SOEs and their state-owned parent companies. As most listed SOEs in China were established as fundraising vehicles for their parent SOEs, they often maintain substantial personnel and business connections with the latter. Indeed, a survey of 109 listed companies controlled by central SOEs in 2010 found that 80 per cent of the chairman positions in these companies were held by senior executives of the companies' state-owned parents.[6]

One major consequence of this regulatory framework was the lack of authority and independence of SOE boards to perform their oversight functions over the management, particularly the chairman. Board independence and authority is generally considered an essential mechanism of corporate governance for not only private sector but also public sector

5 This is with the exception of supervisory board members acted by employee representatives. The percentage of employee representatives was specified as no less than one-third in the 2005 revision of the PRC Company Law.

6 卢福才 [Lu Fucai] (ed.), 《中央企业公司治理报告》 [Report on Corporate Governance of Central State-owned Enterprises] (China Economic Publishing House, 2011) 55.

companies. For example, the OECD Guidelines on Corporate Governance of State-owned Enterprises (OECD Guidelines) provide that 'boards of SOEs should have the necessary authority, competencies and objectivity to carry out their functions of strategic guidance and monitoring of management'.

However, deprived of substantial management powers, including the power to appoint and evaluate top corporate executives, boards in Chinese SOEs were not strong monitors of their legally powerful and politically well connected chairmen. Compared with the board of directors, the board of supervisors was an even weaker form of monitoring. Whilst lacking the power to appoint and remove directors including the chairman, the supervisors, typically nominated by the controlling shareholders/parent SOEs and the listed companies' management, faced the problem of 'hav[ing] to bite the hand that feeds them' (Tomasic and Andrews 2007: 112).

Some changes to this weak regulatory framework took place towards the end of the 1990s. As the concept of 'corporate governance' was officially endorsed by the Party in 1999,[7] the China Securities Regulatory Commission (CSRC, China's central government authority for the regulation of the stock market) was given the leading role of improving corporate governance of listed companies, including listed SOEs.

Since the early 2000s, the CSRC has sought to introduce checks and balances into the governance of listed companies by borrowing from advanced market economies. For example, drawing upon the system of independent directors in Anglo-American jurisdictions, the CSRC required all listed company boards to be composed of at least one-third independent directors, with at least one of these with an accounting background.[8] The CSRC also issued the Code of Corporate Governance for Listed Companies modelled on the OECD Principles of Corporate Governance. The code, among other things, recommends that all listed companies adopt specialised board committees (including the audit committee, the nomination committee and the remuneration and appraisal committee) comprising a majority of independent directors. However, these measures led to more formal than substantive changes. The new independent directors did not play an important role in enhancing corporate governance. This was, in part, owing to the lack of independence of these directors from the parent SOEs and the listed companies' management to whom they owed their appointments (Andrews and Tomasic 2005: 291–92).

With the lax internal, as well as external monitoring environment (as discussed below), the problem of insider control in SOEs was prevalent, and was reflected in a number of high-profile corporate scandals in the early to mid-2000s. For example, the 2004 China Aviation Oil saga led to the collapse of the group's Singapore-listed subsidiary. In another case, a former chairman of Sinopec was sentenced to a suspended death penalty for taking bribes of RMB 196 million (approximately AUS$ 40 million).

Faced with the poor management of SOEs, including listed SOEs, Chinese policy-makers resorted to further governance reforms. As discussed below, through the 2005 corporate law revision, various SASAC-led initiatives, as well as China's current round of SOE reforms,

7 《中共中央关于国有企业改革和发展若干重大问题的决定》[Decision of the Central Committee of the Chinese Communist Party on Several Major Issues Concerning the Reform and Development of State-owned Enterprises], Adopted at the Fourth Plenum of the 15th Central Committee of the Chinese Communist Party, 22 September 1999.

8 《关于在上市公司建立独立董事制度的指导意见》 [Guidelines for the Introduction of Independent Directors into Listed Companies] (People's Republic of China) China Securities Regulatory Commission, 16 August 2001.

and many more Anglo–American market-based mechanisms have been introduced to strengthen corporate governance, particularly the monitoring of senior executives. Whilst some of these changes put into place more internal checks and balances on the exercise of management powers, others sought to enlist market-based institutions, such as foreign institutional investors and stock market regulators, in the disciplining of managers.

At the same time, the problem of insider control of SOEs by managers was also tackled at the level of state assets management, with various institutional reforms carried out to enhance China's system for managing state investment in enterprises. However, as will be considered below, the introduction of these wide-ranging market-based changes have not caused China's post-2005 regulation of state-manager relations in SOEs fundamentally to shift away from a state-led approach. On the other hand, the problem of insider control of SOEs by managers has also continued.

3 The 2005 corporate law reform and SASAC-led reforms of SOE governance

China's SOE governance reform efforts have undergone some significant changes since the early 2000s. Two major regulatory events underlined this period of reform prior to the Third Plenum of the Eighteenth Party Congress. The first was the 2005 major revision of the Chinese 1993 Company Law and 1998 Securities Law. Commentators suggest that, with the adoption of 'more traditional corporate governance objectives' (Tomasic 2010: 195), the 2005 corporate law amendments have significantly modernised or Westernised the Chinese systems of corporate law and corporate governance, particularly the governance of listed SOEs (Feinerman 2008: 57).

Another event during this period was the Party's announced reform of China's system for managing state assets in enterprises, which occurred in November 2002. This was followed by the establishment of SASAC in early 2003. The creation of SASAC, amongst other objectives, was intended to address the lack of a single uniform representation of the interests of the state in corporatised SOEs. Until the early 2000s, the administration of corporatised SOEs was scattered amongst different central and local government agencies. This not only led to the phenomenon of 'no entity responsible for SOEs' bottom line' (The World Bank 1997: xii), but also exacerbated the problem of insider control in corporatised SOEs.

To end this situation, at the Sixteenth Party Congress the Party put forward two guiding principles for the reform of China's system for managing state investments in SOEs. The first was the separation of state investor functions in SOEs among different levels of government to 'give full play to the initiative of both central and local authorities'.[9] Second, a specialised state-owned assets authority was to be established at each government level to centralise the regulation and management of state assets in enterprises, as well as to serve as a leading government agency for the further reform of SOEs at various government levels. Consequently, SASAC was established as a special commission of the State Council. Upon its creation, SASAC was initially bestowed with a portfolio of then 196 large industrial and commercial enterprises previously administered by the central government under its

9 Full Text of Jiang Zemin's Report at the 16th Congress of the Chinese Communist Party (18 November 2002) http://english.people.com.cn/200211/18/eng20021118_106983.shtml (last accessed 3 June 2016).

control.[10] As discussed below, and echoing the 2005 corporate law reform, the creation of SASAC led to many Anglo–American market-based mechanisms of corporate governance being introduced into SOEs, particularly central SOEs as the state-owned parents of over 300 listed SOEs.

Changes to corporate governance in SOEs brought by the 2005 corporate law reform

The 2005 Company Law did not alter the basic structure for corporate governance in listed SOEs established by the 1993 Law (thereby preserving the avenues for state intervention in corporate affairs). However, drawing upon Anglo–American jurisdictions, the revised Company Law has made some efforts to improve the authority of the board by readjusting the roles and responsibilities of different corporate organs. In the meantime, the new Company Law has sought to improve the accountability of directors and managers through strengthening directors' duties and shareholders' remedies.

First, the 2005 Company Law strengthened the role of the board of directors in management decision-making. As mentioned earlier, under the 1993 Company Law, the power to convene meetings of the board of directors was solely vested in the chairman. The new Company Law made it clear that where the chairman failed to perform any of his responsibilities, including those of convening and chairing a board meeting, such responsibilities must be performed by the deputy chairman or, if this is not possible, by a director nominated by more than half of the directors (Article 110(2)). To ensure equal decision-making power is enjoyed by all directors, the new Company Law also specified the principle of 'one director one vote' for board resolutions (Article 112(2)). As a further effort to strengthen the role of the board, the new Company Law formally endorsed the system of independent directors for listed companies introduced by the CSRC (Article 123).

As a corollary to empowering the board of directors, the new Company Law also removed some provisions from the 1993 Law that granted excessive powers to the chairman. For example, the revised Company Law deleted the provision that gave the board of directors the power to delegate part of its functions to the chairman. The 2005 Law also allowed companies to appoint their legal representatives from a broader range of executives, including the chairman, executive directors and the general manager (Article 13). Consequently, a former provision in the 1993 Law that conferred on the chairman the power to sign for the issue of shares and corporate bonds has been removed. Nevertheless, it should be noted that as the new Company Law does not specifically prohibit companies from conferring such powers on their chairmen, the real impact of these legislative changes on the chairman's role can be quite limited.

In addition to empowering the board of directors, the 2005 Company Law sought to strengthen the role of the supervisory board by granting it more powers to monitor and discipline directors. Thus, apart from its routine powers to inspect a company's financial affairs and audit directors' meetings, the supervisory board was granted the power to raise questions and make suggestions at meetings of the board of directors (Articles 119(1), 55(1)). The supervisory board was also granted the power to investigate any irregularities in company

10 For enterprises in the financial sector that fell outside SASAC's purview, Central Huijin Investment Limited was established by the Ministry of Finance to hold and manage state shares in major financial institutions, including China's four largest commercial banks.

operations. In doing so, it may seek assistance from professional advisers such as accountants, at the expense of the company (Articles 119(1); 55(2)).

Where a director or senior manager fails to rectify an alleged wrongdoing at request, the supervisory board has more options at its disposal. These include convening and presiding over an extraordinary general meeting to report its findings to the shareholders (Articles 119(1), 54). The supervisory board may also launch a derivative action against the wrongdoer at the request of shareholders who meet certain thresholds (Article 152(1)). Of course, with the ongoing lack of independence of the supervisors from the management and the parent SOEs, the extent to which these newly acquired supervisory powers can be put into practice remains questionable.

With respect to directors' duties, the 1993 Company Law only broadly required directors, supervisors and the general manager to 'perform their functions and responsibilities loyally', and omitted the directors' duty of care and diligence. Under a new chapter entitled 'Qualifications and Duties of Directors, Supervisors and Senior Managers', the 2005 Company Law specifically subjects directors, supervisors and senior managers to both the duty of loyalty and the duty of care and diligence (Article 148(1)). The new Company Law also expands the circumstances that would constitute a breach of directors' duty of loyalty. Thus, various conflict of interest situations arising in the Anglo-American jurisdictions, including usurping corporate opportunity and accepting secret commissions, have been included (Article 149). In the meantime, some changes have also been introduced by the 2005 Securities Law to strengthen information disclosure by listed companies.[11]

Last but not least, this revamped regime of directors' duties has been complemented by a new regime of shareholders' rights and remedies. Indeed, strengthening legal protection of investors was one of the most pronounced objectives of the 2005 corporate law amendments. Many new relevant provisions have been introduced through drawing upon experiences of the Anglo-American jurisdictions. Whilst some of these provisions provide minority shareholders with more opportunities to participate in corporate decision-making (for example, the introduction of cumulative voting for joint stock companies subject to the company's constitution), others afford them better protection from abuse of power by controlling shareholders and other corporate insiders. Particularly, the introduction of several Anglo-American style shareholder remedies, including derivative and direct lawsuits, has been considered as 'arguably the single most important rule of law development in China's corporate law system' (Wang 2008), and represents 'a broader formal shift in the Company Law towards a greater emphasis on judicial power and the ex post remedies instead of ex ante supervision by administrative agencies' (Clarke and Howson 2012: 243).

Needless to say, the passage of the 2005 Company Law and the 2005 Securities Law has also generated a new round of administrative rule-making. Whilst some of these rules have mainly concerned the implementation of legislative changes, others introduced new measures for further modernising the governance of China's listed companies, including listed SOEs. One particular set of rules of this latter category has been the Basic Standards for Enterprise Internal Control (the Basic Standards) made by the CSRC in conjunction with four other

11 For example, art 68 of the 2005 Securities Law requires directors, supervisors and senior managers of listed companies to issue their written opinions on company periodical reports and guarantee the truthfulness, accuracy and completeness of any information disclosed by their companies. Article 67 extends the definition of 'major events' that are subject to continuous disclosure by listed companies to include pending judicial investigation into company crimes.

central government authorities.[12] Widely referred to in the media as the 'Chinese version of the Sarbanes-Oxley Act', the Basic Standards require all listed companies in China to establish an internal control system in line with the framework adopted in the US Sarbanes-Oxley Act by July 2009.

Listed companies are further required to undertake self-evaluation of their internal controls, publish annual self-evaluation reports and appoint accounting firms to audit and report on the effectiveness of their internal controls. In addition, to motivate directors and managers to maximise the financial performance of their companies, the CSRC has allowed listed companies that satisfy certain prescribed conditions to adopt equity-based incentive plans to remunerate their directors and managers.[13] The implementation of these plans has become possible with the 2005 'split share structure' reform, which converted non-tradable state shares into tradable shares.[14]

SASAC-led reforms

Whilst China's post-2005 legal and regulatory reforms outlined above mainly concern listed SOEs, the various governance reforms initiated by SASAC towards central SOEs deserve some special attention. As large enterprises in strategically important sectors and key fields,[15] the combined assets of central SOEs account for about one-third of China's total state investments in enterprises.[16] Further, as wholly state-owned parents of over 300, generally the largest listed companies in China, corporate governance in central SOEs also shapes the governance of the latter.

Governance reform in the central SOEs had lagged behind their listed subsidiaries prior to the creation of SASAC. Notwithstanding the passage of the first PRC Company Law in

12《关于印发《企业内部控制基本规范》的通知》[Circular on Release of the Basic Standards for Enterprise Internal Control] (People's Republic of China) Ministry of Finance, China Securities Regulatory Commission, National Audit Office, China Banking Regulatory Commission and China Insurance Regulatory Commission, 22 May 2008; Basic Standards art 10.

13《上市公司股权激励管理办法 (试行)) [Measures for the Administration of Equity Incentive Plans of Listed Companies (For Trial Implementation)] (People's Republic of China) China Securities Regulatory Commission, 31 December 2005;《国有控股上市公司（境外）实施股权激励试行办法》 [Trial Measures for the Implementation of Equity Incentive Plans by State-controlled Companies Listed Overseas] (People's Republic of China) State-owned Assets Supervision and Administration, 27 January 2006; 《国有控股上市公司 (境内) 实施股权激励试行办法》[Trial Measures for the Implementation of Equity Incentive Plans by Domestically Listed State-controlled Companies] State-owned Assets Supervision and Administration Commission and Ministry of Finance, 30 September 2006.

14《关于上市公司股权分置改革试点有关问题的通知》[Notice on Relevant Issues concerning the Pilot Reform of Split Share Structure in Listed Companies] (People's Republic of China) China Securities Regulatory Commission, 29 April 2005, s 3(4);《关于上市公司股权分置改革的指导意见》[Guiding Opinion on Reforming the Split Share Structure in Listed companies] (People's Republic of China) China Securities Regulatory Commission, State-owned Assets Supervision and Administration Commission, Ministry of Finance, People's Bank of China and Ministry of Commerce, 23 August 2005.

15《中华人民共和国企业国有资产法》 [Law of Enterprise State-owned Assets of the People's Republic of China] (People's Republic of China) National People's Congress, 28 October 2008, art 4.

16 '财政部公布 2013 年全国国有企业财务决算情况' [2013 SOE Financial Statements released by Ministry of Finance] Chinese Central Government Website (28 July 2014) http://www.gov.cn/xinwen/2014-07/28/content_2725636.htm (last accessed 3 June 2016).

1993, many central SOEs remained registered under the 1988 Law on Industrial Enterprises Owned by the Whole People.[17] In relation to governance arrangements, these enterprises followed a 'factory head responsibility system' prescribed by the 1998 law (Article 7). This one-man-in-control system also had a strong hold in the central SOEs that were converted into wholly state-owned companies, and registered under the 1993 Company Law. This was despite the Company Law requirement for the establishment of a board structure in all companies, including wholly state-owned companies. With overlapping senior executives in the parent SOEs and their listed subsidiaries, this one-man-in-control model also contributed to the problem of insider control in listed SOEs.

SASAC has undertaken two main steps as part of its overall strategy to transform its central SOEs into internationally competitive large businesses. Given the role of SASAC in guiding and supervising the operations of its local equivalents, these steps may also be expected to have been followed to various extents at local government levels.[18]

The first of these steps was the 'standardised board' reform seeking to improve the effectiveness of the board of directors in corporatised central SOEs. SASAC initiated a pilot programme in June 2004 and selected seven central SOEs to participate in the experiment of the 'standardised board'. By the end of 2014, 52 of the then 121 SASAC-controlled SOEs had undergone such reform.

The structure of the 'standardised board' as promoted by SASAC seems to be consistent with the OECD Guidelines on Corporate Governance of State-owned Enterprises in many aspects. According to a regulatory document released by SASAC,[19] the 'standardised board' should have seven to thirteen directors, with the majority being external directors nominated by SASAC (indeed, the introduction of SASAC-nominated majority external directors into central SOE boards has been widely considered the centrepiece of the standardised board reform).

SASAC has also set out detailed rules concerning the desirable mixture of skills among the external directors. For example, the majority of outside directors should have experience in managing large enterprises, and at least one should have a background in accounting. Appointment of external directors from foreigners is also encouraged for companies with substantial operations overseas. The 'standardised board' should also establish several board committees, including the nomination committee, the remuneration and evaluation committee and the audit committee, to act as advisory bodies to the board. Whilst the majority members of the nomination committee should be external directors, the latter two committees should only be formed by external directors.

To further reduce the concentration of management powers in central SOEs, SASAC has required that the standardised board display a clear separation of the role of the chairman from that of the general manager and the role of the board from senior managers involved in the day-to-day operations of the company. The chairman should be responsible for the

17 《全民所有制工业企业法》 [Law on Industrial Enterprises Owned by the Whole People] (People's Republic of China) National People's Congress, 13 April 1988.

18 《企业国有资产监督管理暂行条例》 [Interim Regulations on the Supervision and Administration of Enterprise State-owned Assets] (People's Republic of China) State Council, 13 May 2003, art 13.

19 《董事会试点中央企业董事会规范运作暂行办法》 [Interim Measures for the Standard Operation of the Board of Directors of Central State-owned Enterprises under the Pilot Program on Board of Directors] (People's Republic of China) State-owned Assets Supervision and Administration Commission, 20 March 2009, art 22.

oversight of the proper functioning of the board, and the general manager for the organisation of company day-to-day business operations. The two positions should, where possible, be separate.

To limit the management powers of the chairman, SASAC encourages central SOEs to appoint their chairman from external directors and their legal representatives from general managers. To separate the role of the board from senior managers, managers other than the general manager (such as the deputy general manager and chief accountant) should not act as directors. In the meantime, to empower the standardised board, SASAC also delegated the central SOE boards that have completed this transformation, the power to appoint, evaluate and remunerate some of their senior management positions, such as the general manager, chief accountant and the board secretary.

Relevant to corporate governance, another step undertaken by SASAC has been the promotion of full listing of the typically wholly state-owned central SOEs on domestic and international stock markets. There are, of course, many reasons for SASAC to pursue this goal. For example, with additional funds raised from the market, full-listing will help central SOEs to increase their economies of scale, and thereby their international competitiveness. For SASAC, full listing would also lead to better liquidity of state-owned assets held by enterprises, which means greater flexibility and efficiency in the management of state assets.

The improvement of the governance of central SOEs was, however, one of SASAC's chief concerns. According to Shao Ning, a former deputy director of SASAC, overseas listing would not only force central SOEs to undergo thorough restructuring, but would also expose them to scrutiny by foreign stock market regulators and international investors, including sophisticated institutional investors. By the end of 2011, 40 central SOEs had listed the whole, or substantially the whole, of their main business on Chinese mainland and overseas (primarily Hong Kong) stock markets.[20] Few of these giant groups have, however, achieved the full listing of the parent central SOEs for various reasons, including resistance from central SOE leaders.[21]

4 China's search for a version of Singapore's Temasek model: SOE reform plans announced at the Eighteenth Party Congress

This trend in favour of market-based reform of SOE governance has continued as a new generation of Chinese leaders came into power. This is despite some signs of a reversal in certain respects, as considered below. The various reform plans released by the Party under its current round of SOE reform efforts run from the adoption of a capital management-based approach to the management of state investments in enterprises; it has included the development of mixed ownership and professional management in SOEs, as well as the

20 '国资委再推央企整体上市，已上市央企融资超 9000 亿' [SASAC Continues to Promote the Full Listing of Central SOEs, Funds Raised by Listed Central SOEs Exceeded RMB900 Billion], *China Venture* 18 May, 2012 http://news.chinaventure.com.cn/2/20120518/86119.shtml (last accessed 3 June 2016).

21 Two main factors have contributed to the slow process in full listing of central SOEs. First, many of these parent SOEs have some non-performing assets or welfare functions that are difficult to incorporate into the listed companies. This is despite the fact that, in order to improve the efficiency of central SOEs, SASAC has, since its establishment in 2003, helped these enterprises to divest from their non-core businesses and social welfare functions. Second, the full listing plans have to be devised and implemented by parent SOEs, who naturally have a strong disincentive to go to full listing by forcing themselves to be integrated into their listed subsidiaries.

classification of SOEs based on their functions (e.g. commercial and public interest SOEs) so as to achieve more streamlined regulation and supervision.[22]

Amongst these strategies, the Party's call for the adoption of a capital-management approach to the management of state investments in enterprise has been widely considered as inspired by the Temasek model in Singapore. As outlined by the Party, a capital management-based approach would enhance the efficiency of the management of state assets by enabling the state to focus on maintaining and steadily increasing the overall value of state assets. Through separating capital management from the day-to-day operations of the SOEs, this approach would also help to improve corporate governance.

Nevertheless, the decision to move towards a capital management-based approach also reflects the Party/government's rethinking of the role of SASAC in the management of state assets and central SOEs. SASAC has played a crucial role in transforming central SOEs from traditional SOEs into large internationally competitive businesses. As discussed earlier, the consolidation of state powers over SOEs in SASAC has enabled the Commission to carry out a broad range of reforms, including corporate governance reforms of these large companies.

However, the inherent conflict between the regulatory and state shareholder roles of SASAC (and its local equivalents) has led to some unintended consequences. Particularly in relation to corporate governance, it has exacerbated, rather than solved, the dual governance problem associated with the central SOEs. On the one hand, the dual role of SASAC as both a regulator of state assets and state shareholder has led SASAC to be heavily involved in the management of the central SOEs. This is especially so because, at the time of its creation, SASAC had been mandated to 'combine its management of state assets with the management of executives and (major) corporate affairs'.[23]

On the other hand, since its creation, SASAC has prioritised fostering larger and stronger central SOEs, and the relentless pursuit of business growth and expansion has rendered its regulatory role largely subsidiary to its state investor function (Liu and Huang 2014: 42). This has further meant that SASAC has failed to exercise effective monitoring and discipline of central SOE executives, thereby perpetuating the problem of insider control within these large companies. Indeed, as the large number of disciplinary actions taken by the Party Central Commission for Discipline Inspection against central SOEs and their executives over the past year suggest, the various SASAC-led reforms of corporate governance have resulted in very limited success.

The adoption of a capital management-based approach by drawing upon Singapore's Temasek model would help to address the Party/government's objectives as stated above, including the objective to separate the regulatory role of SASAC (and their local equivalents) from its investor function. Arguably, the adoption of this approach will also be complemented by other reform strategies announced at the Eighteenth Party Congress, such as the development of mixed ownership and professional management in SOEs. However, as considered below, it remains questionable whether this raft of new strategies would lead to a fundamental shift in the Chinese approach to the regulation of state-managers in SOEs, as well as provide an effective solution to the dual problem of corporate governance associated with these companies.

22 Decision on Deepening Reforms (n 1).

23 Full Text of Jiang Zemin's Report at the 16th Congress of the Chinese Communist Party (18 November 2002) http://english.people.com.cn/200211/18/eng20021118_106983.shtml (last accessed 3 June 2016).

5 China's post-2005 regulation of state-managers in SOEs: continuities and implications

The wide-ranging changes in China's post-2005 regulation of state-manager relations reviewed above beg the question of 'what has not changed?' First and foremost, the ultimate control of the Party-state over senior personnel appointments in the parent SOEs, including central SOEs, has not changed and has, arguably, been strengthened with more recent regulations.

Indeed, Party appointment and evaluation of corporate executives has remained a chief instrument for the Party-state to retain its control over large SOEs. In relation to the central SOEs, the top three leadership positions, namely the chairman, the Party secretary and the general manager, in 53 of the largest central SOEs are still appointed and evaluated by the Organisational Department of the Central Party Committee. For the remaining 68 central SOEs, as noted earlier, SASAC has authorised those with a standardised board structure to appoint some of their senior management positions, such as the general manager and the deputy general manager. SASAC, however, retains its power over the appointment, evaluation and remuneration of the top two leadership positions in these enterprises, namely the chairman and the Party secretary. Moreover, SASAC also appoints, evaluates and decides the remuneration of other directors, including external directors and supervisors (except those acted by employee representatives) in these central SOEs.

Personnel decisions in local SOEs at provincial, municipal and county levels are managed by the local branches of the Organisation Department of the Party Central Committee and the local equivalents of SASAC (Szamosszegi and Kyle 2011: 75). There is no suggestion that Party appointment of senior SOE executives in central SOEs extends to their listed subsidiaries. However, this might not, in reality, lead to significantly different practice in the listed SOEs, given the high level of commingling of top executives in the central SOEs and their listed subsidiaries.

This system of Party/government appointment and evaluation of parent SOE executives is unlikely to be affected by the current round of SOE reforms. First, although the Party called for 'increasing the proportion of market-oriented recruitment' to promote professional management of SOEs,[24] it has expressed no intention to relinquish Party/government control over the appointment of top executives, including the chairmen in SOEs. Nor is the mixed ownership reform of SOEs likely to have any significant impact on the continuation of this system. Whilst the mixed ownership reform has generated a great deal of excitement amongst investors on the Chinese stock market, there is no evidence that this reform will fundamentally alter the controlling shareholder position of the state in large and strategically important SOEs, including the central SOEs. As President Xi pointed out, public ownership will remain the mainstay of China's socialist market economy, and China will 'unwaveringly consolidate and develop the public sector' to 'enhance its vitality' and 'capacity to leverage and influence the economy'.[25]

Further, under the current 'strengthening the Party role' approach adopted in China, Party control of central SOEs is likely to be tightened rather than loosened. In June 2015, the Party Central Committee released the Temporary Regulations on the Work of the

24 Decision on Deepening Reforms (n 1).
25 ibid.

Chinese Communist Party Committee (Temporary Regulations).[26] The Temporary Regulations require that a Party Committee be established in a wide range of state and non-state organisations, including all SOEs affiliated to the central government, which include but are not limited to SASAC-controlled central SOEs (Article 5). Given the unitary Party/government system followed in China, these regulations are likely to be mirrored to various extents at local levels.

According to the Temporary Regulations, the Party Committee of a central government-affiliated SOE should consist of three to nine members, drawn from Party members from the board of directors, the board of supervisors, senior management and the leader of the enterprise-based Party Disciplinary Inspection Committee. The position of secretary of the Party Committee should be assumed by the chairman (which signifies the ongoing prominence of the chairman's role in the management of SOEs) or the general manager, where a board of directors has not yet been established in a SOE (Article 7).

The presence of a Party Committee in Chinese companies has long been facilitated by the Chinese Company Law.[27] The Temporary Regulations, however, for the first time, grant the Party Committee the 'core leadership' position in enterprises in which it has a presence (Article 2).[28]

It is not clear how the enhanced position of the Party Committee will fit into existing governance structures in central SOEs, particularly the board of directors. Nevertheless, in elevating the Party Committee to the core leadership status in central SOEs, the governance of these companies seems to have moved away from the board-centred approach to corporate governance adopted in Anglo–American jurisdictions. This approach also seems to contradict the 'standardised board' reform initiated by SASAC, which, to a limited extent, aims to strengthen the authority and independence of central SOE boards along the lines of the OECD Guidelines.

The involvement of the state in the appointment of top corporate executives aside, nor is the Party/government's influence over business decision-making in parent SOEs, including the central SOEs, likely to be subject to fundamental change under the current round of SOE reforms. According to a document released by the State Council in November 2015,[29] China's new capital management-based approach to the management of state assets will be implemented through the establishment of a three-tiered regulatory structure. At the central government level, this structure will, first, consist of SASAC as the regulator of state assets; second, a mid-tier of state capital operating and investment companies[30] to be established by

26《中国共产党党组工作条例（试行）》Temporary Regulations on the Work of the Chinese Community Party Committee (Temporary Regulations), Centre Committee of the Chinese Communist Party, effective from 11 June 2015.

27 The 1993 Company Law provided that a grassroots organisation of the Party shall be established in all companies to carry out its activities according to the Party's Constitution (art 17). The 2005 Company Law retains this provision, and goes further to require that 'companies shall provide necessary conditions to assist the activities of the Chinese Communist Party' (art 19).

28 The 'core leadership' of the Party Committee is also specified in《关于在深化国有企业改革中坚持党的领导加强党的建设的若干意见》(Several Opinions on Upholding the Party's Leadership and Strengthening Party Construction in Deepening the Reform of State-owned Enterprises), The Chinese Communist Party Central Committee, 20 September 2015.

29《关于改革和完善国有资产管理体制的若干意见》[Several Opinions on Reforming and Perfecting the System for State-owned Assets Management], State Council, 4 November 2015.

30 State capital operating companies are state holding companies that hold and manage shares in a portfolio of unrelated SOEs, while state capital investment companies are state-owned industrial

SASAC or transformed from certain existing central SOEs as the investment arm of SASAC; and, third, a lower tier of central SOEs and/or their subsidiaries.

This three-tiered structure may, at least in form, share some of the characteristics of the Temasek model. This is because the latter also involves the establishment of a state holding company (Temasek Holdings) as the investment arm of government. However, the Ministry of Finance of Singapore has very little power over Temasek Holdings beyond its role as the state shareholder.[31] By contrast, SASAC and its local equivalents, in their role as both a state shareholder and regulator of state assets in enterprises, have been accustomed to be involved in the management of SOEs under their control. This relationship is unlikely to be severed with the insertion of a layer of state investment companies wholly-owned by SASAC. After all, as the regulator of state assets and the ultimate controller of central SOEs, SASAC is still responsible for preserving and increasing the value of state investments in these enterprises.

This 'reform, but without losing Party/government control' approach adopted in China's post-2005 regulation of state-manager relations in SOEs is difficult to understand from the perspective of Anglo–American corporate governance. Nor does it sit comfortably with the type of state shareholder-manager relationships recommended in the OECD Guidelines. Whilst the state is projected as 'an informed and active owner' in the Guidelines, it is suggested that it not to be 'involved in the day-to-day management of SOEs'.

However, this approach can be explained from the perspective of China's state-led model of economic development, in which state control of large and strategically important SOEs is a chief component. As indicated earlier, state-led corporate governance is primarily a tool of the state for promoting economic-oriented policy goals through state intervention in corporate affairs. Viewed in this light, none of the corporate governance mechanisms, market or non-marked-based, adopted by Chinese policy-makers post-2005 has been an end in itself. Put together, they form an integral part of the policy tools of the state that have been used to maintain effective control and coordination of SOEs, whilst grappling with the need to improve their management and performance amidst changing international and domestic expectations.[32]

This 'policy tool' function of corporate governance mechanisms has indeed underlined China's recent move in strengthening the Party's role in central SOEs, which is otherwise inconsistent with the market-based changes discussed above. Where the Anglo–American corporate board structure was not seen as particularly effective in achieving the Party/state's policy goals, it was quickly modified with non-market-based means adopted by the Party.

Arguably, China's post-2005 regulation of state-manager relations in SOEs is also consistent with an important feature of the Chinese form of state capitalism, as illustrated by commentators. This reflects the remarkable ability of the Party-state to combine administrative with market-based means to achieve economic development-oriented policy goals. Indeed, this feature has led Bremmer to define state capitalism as 'a system in which the state functions as the leading economic actor and uses markets primarily for political gain' (Bremmer 2009: 41).

holding companies converted from parent SOEs of certain state-owned or controlled corporate groups.

31 The Tamasek Charter.

32 Indeed, this objective is also reflected in the Temporary Regulations, which seek to 'enhance the governing capacity of the Party and ensure the Party's command of the overall situation and coordination of the core functions of all aspects of leadership'.

However, this new regulatory approach relying upon a combination of market and non-market-based means is unlikely to provide an effective solution to the dual governance problem associated with Chinese SOEs, including the problem of insider control by top corporate executives. The strengthening of the role of the Party in central and local parent SOEs may potentially provide some rather intrusive means of imposing discipline upon Party-appointed managers, given the pervasive reward and sanction systems at the Party's disposal (Naughton 2010: 456). However, as with SASAC, the Party is not immune from the inherent conflict entailed in its multiple political, economic and social goals in managing Chinese SOEs.

More fundamentally, strengthening the Party's role in the parent SOEs further marginalises the role of their boards in monitoring and disciplining top corporate executives. Under the current framework for the governance of central SOEs, the chairman is entrusted with three prominent roles, namely as SOE chairman, as de facto chief executive officer and as secretary of the Party Committee, which is bestowed with the top authority in corporate management decision-making. As a consequence, board oversight of the chairman's role is likely to be further diminished. Indeed, with the ongoing involvement of the state in the appointment of top executives and management decision-making in parent SOEs, and overlapping senior executives in the listed companies and their state-owned parents, the various legal and regulatory reforms aimed at strengthening the governance of listed SOEs could, in reality, lead to very limited progress.

6 Conclusion

This chapter has reviewed China's post-2005 developments in the regulation of state-manager relations in large state-controlled listed companies. By examining the changes and continuities, the chapter has shown the emergence of a new state-led approach to the regulation of state-manager relations in these companies. On the one hand, this approach has significantly moved away from the old post-war state-led model (as discussed by Hansmann and Kraakman and comparative capitalism researchers) by applying extensive market-based governance mechanisms to both listed companies and their state-owned parents. On the other hand, ongoing state control in the appointment of senior SOE executives and management decision-making suggest that this approach has been adopted so as to strengthen, rather than to weaken, the effectiveness of state control over these large enterprises.

This new state-led approach to the regulation of state-managers relations in Chinese SOEs is difficult to reconcile with the Anglo–American shareholder-oriented model of corporate governance. It cannot, however, be separated from China's efforts to maintain its state-led model of economic development amid international and domestic pressures for change and the poor governance of these SOEs.

The long-term viability of this approach is likely to hinge on the balance between the will and capacity of the state to adjust its competing roles over its SOEs and the risk of lax internal controls that persists at the corporate level. As this chapter has suggested, Chinese policy-makers will continue to face the battle between retaining ultimate state control over the country's large SOEs and improving their management (and efficiency). Nevertheless, as long as this regulatory approach continues to serve state policy goals, it is unlikely to be subject to significant changes in any near future.

In light of the situation discussed above, foreign regulators and corporations dealing with Chinese SOEs should reassess the somewhat optimistic convergence models that have been so widely articulated in the corporate law literature, given the ongoing dominant position of the Chinese state in the governance of its SOEs.

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